No. 90-929

JUN 5 1991

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

JOSEPH PATRICK DOHERTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

SOMMERSTEIN & PIKE
BY: MARY BOREEZ PIKE
Counsel of Record for Respondent
401 Broadway, 27th Floor
New York, New York 10013
(212) 925-3232

Of Counsel:
ARTHUR C. HELTON
Lawyers Committee for Human Rights
330 Seventh Avenue
10th Floor North
New York, New York 10001

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the respondent, having established a prima facie case for asylum, can be denied that relief under Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), in order to insure that he serve in the country denied his extradition the prison sentence there imposed on him for offenses found to be political under American law.

2. Whether the Second Circuit was correct that the Attorney General abused his discretion under the Refugee Act of 1980 when he denied the respondent's asylum application on the ground that granting it might be injurious to this country's relationship with the country denied the respondent's extradition and to various policy interests.

3. Whether the Second Circuit was correct that the Attorney General abused

his discretion by denying the respondent, who had established a prima facie case of entitlement, the nondiscretionary relief of withholding of deportation pursuant to Section 243(h)(1) of the Act, 8 U.S.C. 1253 (h)(1), without affording the respondent the evidentiary hearing to which the Board of Immigration Appeals (BIA) had found him entitled.

4. Whether the Second Circuit was correct that given the singular circumstances of the case, the Attorney General abused his discretion when he denied the respondent's motion to reopen to apply for asylum and withholding of deportation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
Preliminary Statement	1
STATEMENT OF FACTS	6
The Extradition Proceeding: "The Facts of This Case Present ... the Political Offense Exception in Its Most Classic Form."	6
The Declaratory Judgment Action: The Government's Position is "Startling."	9
The Deportation Proceeding: Successive Rulings in Favor of Mr. Doherty	10
The Immigration Judge Rules in Favor of Mr. Doherty	11
The BIA Rules for Mr. Doherty for the First and Second Times	14
Mr. Doherty Files His Motion to Reopen	16
Attorney General Meese Reverses the BIA Decision in Mr. Doherty's Favor	20
The BIA Decides in Mr. Doherty's Favor for a Third Time	22
Attorney General Thornburgh Rules: Return Doherty, Without Any Hearing, to the Country Denied His Extradition and Where He Fears Persecution	24

Page

The Decision at Issue: The Second Circuit Rules That Attorney General Thornburgh Abused His Discretion ... 27

Summary of the Argument 31

ARGUMENT 38

I. ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION AND ACTED WITHOUT AUTHORITY WHEN HE DENIED ASYLUM IN ORDER TO INSURE THAT MR. DOHERTY SERVED HIS SENTENCE IN A BRITISH PRISON 38

II. THE SECOND CIRCUIT WAS CORRECT THAT ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION BY DENYING MR. DOHERTY WITHHOLDING OF DEPORTATION AND ASYLUM WITHOUT AN EVIDENTIARY HEARING, DESPITE THE BIA HAVING FOUND THAT ONE WAS WARRANTED 52

A. Mr. Doherty is entitled to a hearing on his claim for withholding of deportation in order that the formidable issues of fact which control its disposition may be addressed on the basis of a fully-developed record consisting of evidence submitted by the parties to this case 52

B. The Attorney General cannot deny Mr. Doherty asylum and deport him to the country denied his extradition on the ground that doing so will serve policy interests of the United States ... 79

Page

III. THE BIA AND THE SECOND CIRCUIT WERE CORRECT THAT REOPENING WAS WARRANTED 101

CONCLUSION 110

TABLE OF AUTHORITIES

Cases:	Page(s)
Amanullah v. Cobb, ... 862 F.2d 362 (1st Cir. 1988)	107
American Baptist Churches v. Thornburgh, ... 760 F.Supp. 796 (N.D. Cal. 1991)	98
Bureau of Alcohol, Tobacco and Firearms v. FLRA, ... 464 U.S. 89 (1983)	87
Fong Yue Ting v. United States, ... 149 U.S. 698 (1893)	45, 47
In re Mackin, ... 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981)	39, 40
In re McMullen, ... Magistrate No. 3-78-1099 MG (N.D. Cal. May 11, 1979)	39, 40
INS v. Abudu, ...57, 58, 59 485 U.S. 94 (1988)	
INS v. Cardoza-Fonseca, ...55, 57, 74 480 U.S. 421 (1987)	passim
INS v. Errico, ... 385 U.S. 214 (1966)	100
INS v. Jong Ha Wang, ... 450 U.S. 139 (1981) (per curiam)	91, 103

	Page(s)
INS v. Phinpathya, ... 464 U.S. 183 (1984)	99
INS v. Rios-Pineda, ... 471 U.S. 444 (1985)	83
INS v. Stevic, ... 467 U.S. 407 (1984)	55, 95
Landon v. Plasencia, ... 459 U.S. 21 (1982)	43
Linnas v. INS, ... 790 F.2d 1024 (2d Cir. 1986), cert. denied, 479 U.S. 995 (1986)	47
Manhattan General Equipment Co. v. Commissioner of Internal Revenue, ... 297 U.S. 129 (1936)	86
Matter of Dass, ... Int. Dec. #3122 (BIA 1989)	72
Matter of Doherty, ... 599 F.Supp. 270 (S.D.N.Y. 1984)	2, 7, 8 passim
Matter of Fuentes-Sanchez, ... Int. Dec. #3065 (BIA 1988)	79
Matter of Mackin, ... 668 F.2d 122 (2d Cir. 1981)	93
Matter of McMullen, ... 17 I. & N. Dec. 542 (BIA 1980)	72
Matter of Rodriguez-Majano, ... Int. Dec. #3088 (BIA 1988)	78

	Page(s)
McMullen v. INS, ...45, 61, 64 788 F.2d 591 (9th Cir. 1986)	passim
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., ... 463 U.S. 29 (1983)	86
Parklane Hosiery Co. v. Shore, ... 439 U.S. 322 (1979)	72
Quinn v. Robinson, ... 783 F.2d 776 (9th Cir. 1986), cert. denied, 479 U.S. 882 (1986)	39
Quinn v. Robinson, ... No. C-82-6688 RPA (N.D. Cal. Oct. 3, 1983)	39
Sakhavat v. INS, ... 796 F.2d 1201 (9th Cir. 1986)	66
United States v. Doherty, ... 9, 10, 28 786 F.2d 491 (2d Cir. 1986)	passim
United States v. Doherty, ... 615 F.Supp. 755 (S.D.N.Y. 1985)	9, 10
Zamora v. INS, ... 534 F.2d 1055 (2d Cir. 1976)	71

Treaties, Statutes and Regulations:

[Irish Extradition Act 1965, No. 17	105, 106

Page(s)

[Irish] Extradition (European Convention on the Suppression of Terrorism) Act, 1987 .....16, 17, 19 passim

Supplementary Extradition Treaty With the United Kingdom, S. Tr. Doc. No. 99-8, 99th Cong., 1st Sess. (1985) 41

Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 230, T.I.A.S. No. 8468 7

United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) 36, 55, 56, 80, 94

United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577 ..... 55, 56

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq. 12, 57
- Section 207, 8 U.S.C. 1157 .. 87, 88 passim
- Section 207(e)(6), 8 U.S.C. 1157(e)(6) 85
- Section 208, 8 U.S.C. 1158 .. 84, 88 passim
- Section 208(a), 8 U.S.C. 1158(a) 37, 83, 99
- Section 242(b), 8 U.S.C. 1252(b) 70

Page(s)

- Section 243(a), 8 U.S.C. 1253(a) .....11, 12, 14 passim
- Section 243(h)(1), 8 U.S.C. 1253(h)(1) .....53, 54, 56 passim
- Section 243(h)(2)(A), 8 U.S.C. 1253(h)(2)(A) 53, 77
- Section 243(h)(2)(C), 8 U.S.C. 1253(h)(2)(C) .....53, 61, 73 passim
- Section 244, 8 U.S.C. 1254 .. 90

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) .....29, 35, 37 passim

18 U.S.C. 3181 et seq. 44

18 U.S.C. 3184 44

18 U.S.C. 3186 44

8 C.F.R.:
- Section 3.1(h)(iii) (1990) 16
- Section 3.2 (1990) 104
- Section 108.2 (1975) 89, 101
- Section 208.8(f) (1989) 101
- Section 208.8(f)(v) (1989) .. 80
- Section 215.1 et seq. (1990) . 92
- Section 242.22 (1990) 104

55 Fed. Reg. (1990) .....66, 77, 80 passim

Page(s)

Other Authorities:

"Abrogating the Relative Political Offense Exception to Extradition: The United States-United Kingdom Extradition Treaty," 20 J. Marshall L. Rev. 453 (1987) 40, 51

Anker & Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," 19 San Diego L. Rev. 9 (1981) 88, 89, 90

Banoff & Pyle, "'To Surrender Political Offenders': The Political Offense Exception to Extradition in United States Law," 16 N.Y.U. J. of Int'l L. & Politics 169 (1984) 5, 49, 81

Bassiouni, "The Political Offense Exception Revisited: Extradition Between the U.S. and the U.K. - A Choice Between Allies and Sound Law and Policy," 15 Den. J. Int'l L. & Pol'y 255 (1987) 40

132 Cong. Rec. (1986) 41

Davis, Administrative Law Treatise (2d ed. 1984) 71

Garcia-Mora, "The Present Status of Political Offenses in the Law of Extradition and Asylum," 14 U. Pitt. L. Rev. 371 (1953) 50

Goodwin-Gill, The Refugee in International Law (1983) 81

Page(s)

Gordon & Mailman, Immigration Law and Procedure (rev. ed. 1991) 54, 89

Hearing on the Impact of the Supplementary Treaty Upon American Domestic Law and Upon the American Constitutional Process in the Fight Against Terrorism Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) 40, 96

Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony," 1 Geo. Imm. L. J. 457 (1986) 65, 81

New York Times, June 26, 1990, A1, col. 1 68

New York Times, June 27, 1990, A11, cols. 1-6 68

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979) ..... 56, 73, 74, 76, 80 passim

S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. (1986) 41, 51

U.S. Department of State, Patterns of Global Terrorism: 1988 (1989) 67, 68

No. 90-925

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSEPH PATRICK DOHERTY, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Preliminary Statement

Joseph Patrick Doherty, the respondent, has never been charged with or convicted of any offense against American criminal law. He has nonetheless been incarcerated for close to a decade in an American federal prison.

In 1984, U.S. District Court Judge John E. Sprizzo denied the request of the

British government for the respondent's extradition. He ruled that the acts for which Mr. Doherty was sought were political offenses, not common crimes, and his extradition was barred by the political offense exception provision of the controlling treaty. Judge Sprizzo found the facts of the case to "present the ... political offense exception in its most classic form." Mr. Doherty's acts were but the "latest chapters" in the "ancient struggle" for Ireland's freedom from British governance. Matter of Doherty, 599 F. Supp. 270, 273, 276 (S.D.N.Y. 1984).

In the intervening years, the executive branch has labored to subvert and circumvent the decision denying extradition. When its efforts to attack the decision were judicially rebuffed, it determined to force out of the immigration proceeding the result extradition law and

Judge Sprizzo's decision forbade. Interviewed on CBS 60 Minutes, the Immigration and Naturalization Service (INS) district director who handled the deportation proceeding stated:

> [I]n the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that. (C.A. App. 405.[1])

This effort to accomplish de facto the extradition denied de jure has produced decisions adverse to the government at every stage of the immigration proceeding. Unable to prevail before his own delegatees, one Attorney General and then another entered the case to issue deci-

---

[1]"C.A. App." references are to the joint appendix in the Second Circuit. "Pet. App." references are to the appendix to the certiorari petition. "J.A." references are to the joint appendix filed in this Court.

sions adverse to Mr. Doherty. Such occurrence was unprecedented; so too were their decisions.

Confronted with the most recent ruling adverse to it, the petitioner asks this Court to reverse the Second Circuit and rule that Mr. Doherty can be denied refugee protection and deported without hearing to the country denied his extradition upon the Attorney General's assertion that handing him over would serve this country's policy interests. The Attorney General has never before claimed that the statutory protections of the Refugee Act of 1980 can be denied to one seeking asylum in order to confer a perceived political advantage upon this country. Such claim can be accepted only in derogation of core principles of refugee law.

The principle of refuge is ingrained in the fabric of American history and of

American law, the legacy of our own revolutionary heritage. Political offenders brought this country into existence. Owing to their exercise in what the British deemed treason, it was felt from the nation's earliest days that

> compliance with ... a demand [to surrender a political offender] would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind.[2]

Modern law, both international and domestic, protects refugees from delivery to countries where they reasonably fear persecution. This protection is available to refugees who are political offenders. Nonetheless, to deliver one particular

---

[2]Secretary of State Marcy to Mr. Hulsemann, Sept. 26, 1853, Sec. Doc., 33rd Cong., 1st Sess., Vol. 1, 34, quoted in Banoff & Pyle, "'To Surrender Political Offenders': The Political Offense Exception to Extradition in United States Law," 16 N.Y.U. J. of Int'l L. & Politics 169 (1984).

political offender to the government denied his extradition, the Attorney General here argues for the abrogation of fundamental principles of refugee law.

STATEMENT OF FACTS

On June 18, 1983, Joseph Patrick Doherty was taken into custody. An INS order to show cause and warrant of arrest charged that he was subject to deportation by virtue of being an alien who had failed to establish the date, place, and manner of his entry. J.A. 5-6. Within ten days, Mr. Doherty filed a request for asylum. He feared persecution were he to be deported to the United Kingdom. J.A. 7-18.

The Extradition Proceeding: "The Facts of This Case Present the ... Political Offense Exception in Its Most Classic Form."

On June 27, 1983, a warrant of arrest issued under the extradition treaty between the United Kingdom and the United

States.[3] Matter of Doherty, 599 F. Supp. at 272. The immigration judge thereupon adjourned the immigration proceeding. See C.A. App. 45-46.

On August 16, 1983, the British government filed the formal extradition request. An affidavit stated that Mr. Doherty had been convicted in Northern Ireland of murder, attempted murder, and possession of firearms and ammunition. C.A. App. 240. The offenses were the result of an encounter between an Irish Republican Army (IRA) active service unit and a squad of British soldiers attached to the elite counterinsurgency unit known as the Special Air Service (SAS). J.A. 114-123. The warrant further alleged that Mr. Doherty was wanted for offenses arising from

---

[3] See Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 230, T.I.A.S. No. 8468.

his June 10, 1981, escape--with seven other IRA volunteers--from a British prison in Belfast. C.A. App. 241, 744-755.

Hearings in March and April 1984 produced a voluminous record. Both sides put witnesses forward. Mr. Doherty testified at length. J.A. 109-190; C.A. App. 712-943. The judge concluded Mr. Doherty's offenses were unquestionably political, and his extradition therefore barred. Matter of Doherty, 599 F.Supp. 270. The Justice Department, through the person of a senior official, publicly attacked the decision as "outrageous." C.A. App. 489.[4]

---

[4]A lead editorial in the National Law Journal observed:

> The style of their comments about the judge--whose decision was fully supported by the facts and the law--gives us great concern. For the head of the department's criminal division to express such outrage and make sarcastic comments is to demean the judicial process and the Justice Department itself. (C.A. App. 491.)

The Declaratory Judgment Action: The Government's Position is "Startling."

On February 4, 1985, the executive branch filed an action seeking a judgment declaring Joseph Doherty extraditable. C.A. App. 244-246. The action was unprecedented. United States v. Doherty, 786 F.2d 491, 500 (2d Cir. 1986).

The executive branch lectured the district court that its "'accepting Mr. Doherty's view would ... compel the government to continue refiling the [extradition] request until a favorable decision is obtained, however long that might take.'" Its behavior caused the district court to inquire "whether unlimited repetitions of judicially rejected contentions comport with the dignity of the United States Attorney's Office." The district court dismissed the action for failure to state a claim. United States v. Doherty,

615 F.Supp. 755, 760 n. 5 (S.D.N.Y. 1985).

The Second Circuit, in a 3-0 decision by the late Judge Friendly, affirmed the district court and pronounced the executive's position "startling." Judge Friendly observed that the government had not refiled the extradition request because it "fears it may lose when it tries again[.]" United States v. Doherty, 786 F.2d at 500.

The Deportation Proceeding: Successive Rulings in Favor of Mr. Doherty.

Three weeks after the filing of the declaratory judgment action, the INS lodged six new charges and twelve new factual allegations. J.A. 19-22. Mr. Doherty moved for an order staying the deportation proceeding. C.A. App. 32-77, 83-90. The immigration judge granted the motion, observing that controlling law mandated that extradition proceedings must be com-

pleted before deportation proceedings are concluded. C.A. App. 92-98.

As had the district judge, the immigration judge commented on the government's nonacquiescence to the decision denying extradition. He remarked that "for all intents and purposes ... it's still seeking extradition." C.A. App. 92.

The Immigration Judge Rules in Favor of Mr. Doherty.

When the executive branch did not challenge the Second Circuit's decision by the September 2, 1986, deadline, Mr. Doherty's counsel notified the immigration judge that the deportation proceeding could resume. At conferences on September 5 and 12, 1986, the respondent advised the immigration judge that he would not contest deportation. J.A. 30, 33.

Mr. Doherty requested only that, pursuant to Section 243(a), 8 U.S.C. 1253(a),

of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 et seq., he be permitted to designate Ireland as his country of deportation. In conjunction with designating Ireland, he withdrew his application for asylum and withholding of deportation from the United Kingdom. J.A. 32; Pet. App. 14a. He did so knowing that Ireland would receive him.[5] He also knew that no designation of country had ever been rejected on the ground of prejudice to the interests of the United States. The INS had never even raised such claim in the entire life of the controlling statute. See 8 U.S.C. 1253(a).

---

[5]The respondent is a citizen of Ireland. C.A. App. 181-206. There had never been any doubt that the Irish government would accept him into its territory. A letter from the Irish vice-consul, made available to the immigration judge and the INS, confirmed Mr. Doherty's earlier representations on the subject. C.A. App. 105, 127, 258-259.

The INS raised it here, asserting that Mr. Doherty's deportation to other than the country denied his extradition would be prejudicial to the interests of the United States. It stated that Mr. Doherty was a "terrorist" and that

> Great Britain sought to extradite [him] for his crimes[6] from the United States. That did not succeed. .... To allow Mr. Doherty ... to go to ... Ireland where it's not [at] all clear that he will be punished for his crimes ... would be contrary to the public interest[.] (J.A. 35.)

The INS stated that the case was a matter "of some concern at the highest levels of government" and would "be under the personal review of Attorney General [Meese][.]" J.A. 39. The immigration judge granted it a third adjournment. J.A. 43-44. When the hearing resumed, the

---

[6]These "crimes" were the offenses found by Judge Sprizzo to be political and therefore a flat bar to the de facto extradition the INS was seeking.

INS stated it had nothing further to submit. J.A. 48-49. The immigration judge thereupon ordered Mr. Doherty deported to Ireland.[7] Pet. App. 156a-159; C.A. App. 214.

The BIA Rules for Mr. Doherty for the First and Second Times.

The INS appealed the immigration judge's decision. C.A. App. 215-217. On March 11, 1987, the BIA rendered a unanimous decision, adverse to the INS. Pet. App. 148a-155a. It could find no other case in which a deportee's designated country had been rejected on the ground of prejudice to U.S. interests. Designation being a substantive right, the BIA held that rejection of the deportee's designat-

[7]Mr. Doherty could be deported to the United Kingdom only if Ireland was unwilling to accept him, or failed to advise the Attorney General as to its position on acceptance. Pet. App. 159a. See 8 U.S.C. 1253(a).

ed country on that ground would be improper "in the absence of clear evidence to support that conclusion." The BIA found that the INS had produced none. Pet. App. 154a-155a.

By motion to reopen, the INS sought to submit an affidavit by the associate attorney general who had earlier denounced Judge Sprizzo's decision as outrageous. C.A. App. 299-338; J.A. 51-54. The affidavit set forth the official's opinion that it would be prejudicial to U.S. interests to deport Mr. Doherty to Ireland.

In a 3-2 decision, the BIA denied the INS's motion,[8] but reopened on its own motion. Pet. App. 134a-147a. The BIA found the affidavit unsatisfactory because it was not "based upon evidence that the

[8]The BIA held that the INS had failed to comply with the regulations governing motions to reopen. Pet. App. 135a-140a.

respondent's deportation to ... Ireland will be prejudicial to the United States' interests." Pet. App. 135a, 140a-141a.

The INS, pursuant to 8 C.F.R. 3.1(h)(iii), certified the decision to the Attorney General, who, for five months, did nothing. C.A. App. 356. Mr. Doherty was eventually notified that he would be permitted until December 1, 1987, to file a brief. J.A. 68-70.

Mr. Doherty Files His Motion to Reopen.

The Extradition (European Convention on the Suppression of Terrorism) Act, 1987 (Extradition Act 1987) (J.A. 94-108) was possibly to go into effect in Ireland on December 1, 1987. J.A. 107 [section 13.-(1)]. The Extradition Act 1987 would alter profoundly the extradition law which had previously governed in Ireland. When implemented, it would operate to guarantee Mr. Doherty's certain removal from Ire-

land, the country to which he had been ordered deported, to the United Kingdom, where he feared persecution.

Section 3 of the Extradition Act 1987 had no statutory forebear in Irish law. It specified that certain offenses could not be regarded as political offenses. As to those offenses, extradition would be mandatory subsequent to the act's implementation. J.A. 98-99. Subsection (3)(a)(v) covered offenses for which the British government previously had sought Mr. Doherty's extradition.

Despite uncertainty about when, or even whether, the Extradition Act 1987 would be implemented, uncertainty purposefully made express in the legislation itself,[9] the Extradition Act was permitted to become effective on December 1, 1987.

---

[9] See J.A. 107-108 (section 13) and C.A. App. 391-392 (section 12).

With its implementation, the 15-month-old order directing the respondent's deportation to Ireland became the functional equivalent of an order directing his extradition to the United Kingdom.

Having at all times resisted being returned to the United Kingdom, where he feared persecution, Mr. Doherty filed a motion to reopen within 48 hours of the change in the law. J.A. 55-108; C.A. App. 421-455. He sought to reassert the applications for asylum and withholding of deportation he had filed on June 28, 1983, and withdrawn only in conjunction with his designation of Ireland, the country that had agreed to receive him.

Detailed affidavits supported the motion.[10] The affidavit of Mr. Doherty's

---

[10]Mr. Doherty's motion also encompassed his asylum application. J.A. 6-18. The BIA had other documents relevant to the motion before it as well. C.A. App. 503-943; J.A. 109-190.

counsel addressed the effect of the 1987 Extradition Act's implementation on Irish law in general and on Mr. Doherty's position in particular. J.A. 57-77, 91-108. An affidavit and supporting documents from the respondent's mother chronicled those facts, both as to family history and as to events in Northern Ireland, which, in conjunction with Mr. Doherty's application for asylum, detailed the basis for his fear of persecution in the United Kingdom.[11] J.A. 78-89; C.A. App. 421-455.

---

[11]Threats have already been made by the security forces to family members about that which awaits the respondent upon his return. J.A. 78-89. The security forces and the loyalist paramilitaries have the will and ability to carry the threats out. C.A. App. 503-709. The number and frequency of fatal shootings by the security forces of young men believed to be members of or sympathizers of the republican movement caused Amnesty International to conclude that "a wide-ranging judicial inquiry is essential." C.A. App. 514-516, 517-518, 543-544. (continued)

The BIA referred his motion to the Attorney General. Pet. App. 131a-133a.

Attorney General Meese Reverses the BIA Decision in Mr. Doherty's Favor.

On June 9, 1988, Attorney General Meese reversed the order directing Mr. Doherty's deportation to Ireland. He

---

(cont.)Family members have been subject to repeated arrest and interrogation. A sister's home has been often raided by the security forces; on one such occasion, the security forces seized the transcript of Mr. Doherty's testimony before Judge Sprizzo. Relatives, friends, and neighbors have been victims and targets of sectarian attacks running the gamut from beatings, to attempted murder, to actual murder. Mr. Doherty's family and the other occupants of their tiny nationalist enclave live subject to the intrusive daily presence in their homes and on their streets of the British Army and the paramilitary Royal Ulster Constabulary (RUC). In addition to Mr. Doherty, a sister was interned by the British government and, as with him, imprisoned without charges and without trial. The family home was destroyed when bombed by loyalist paramilitaries. In addition, Mr. Doherty has already been the victim of persecution in the United Kingdom, having been tortured and beaten while in the custody of the security forces. J.A. 8-18, 78-89; C.A. App. 422-455.

ordered Mr. Doherty deported to the United Kingdom instead. Pet. App. 116a-130a. The Attorney General remanded Mr. Doherty's motion to reopen--filed specifically to protect against deportation to the United Kingdom--to the BIA. Pet. App. 130a.

Attorney General Meese ruled that Mr. Doherty was to be deported to the United Kingdom because, having committed "serious crimes" in the United Kingdom, it would be prejudicial to U.S. interests were he not to serve his sentence there. Pet. App. 125a-126a. Deportation to Ireland also "would require the United Kingdom to invoke Irish law to secure respondent's return[,]" a prospect the Attorney General evidently found objectionable. Pet. App. 126a.

The Attorney General credited representations by a Department of State undersecretary for political affairs that the

British government had been "'great[ly] disappointed'" by the decision denying extradition and was very keen "'that the United States effect Doherty's deportation to the United Kingdom[.]'" The Attorney General concluded that if the British government's disappointment over the denial of its extradition request was not assuaged by handing Mr. Doherty over, the denial of the extradition request notwithstanding, U.S.-U.K. relations would be injured and that would be prejudicial to the interests of the United States. Pet. App. 126a-127a.

The BIA Decides in Mr. Doherty's Favor for a Third Time.

The BIA, having had Mr. Doherty's motion to reopen remanded to it by the Attorney General, granted the motion, 3-2, on November 14, 1988. Pet. App. 108a-115a.

The BIA took express note of the cir-

cumstances which had existed at the time of Mr. Doherty's designation of Ireland and upon which he had based his designation. Reopening was justified because subsequent to his designation, "unprecedented circumstances" he "could not have been expected to anticipate" rendered him subject to deportation to a different country, where he feared persecution. The BIA reasoned that if the regulations were read to require Mr. Doherty

> to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to any country to which he might remotely be deported, if he had a fear of returning there.

Pet. App. 99a. The BIA also determined that the evidence submitted by Mr. Doherty established a prima facie claim of persecution. Id. The particulars of the case --including the fact that a United States court had found his offenses to be politi-

cal--merited granting the motion in the BIA's discretion. Pet. App. 99a-100a.

Again, the INS referred the BIA decision in favor of Mr. Doherty to the Attorney General. C.A. App. 963.

Attorney General Thornburgh Rules: Return Doherty, Without Any Hearing, to the Country Denied His Extradition and Where He Fears Persecution.

On June 30, 1989, the Attorney General reversed the BIA decision that had granted Mr. Doherty a hearing on his claims for asylum and withholding of deportation.[12] Pet. App. 46a-91a.

Attorney General Thornburgh determined that Attorney General Meese's decision directing deportation to the United Kingdom was not "an unforeseen, adverse

[12]Attorney General Thornburgh claimed that the regulations governing consideration of motions to reopen do not bind the Attorney General. Pet. App. 55a. Attorney General Meese had earlier advanced the same claim, also without any authority. Pet. App. 121a and n. 6.

administrative decision, constituting a 'new fact,'" a view rejected by the BIA and subsequently to be rejected by the Second Circuit as well. Pet. App. 13a-14a, 57a, 62a, 65a-67a, 98a-99a. Mr. Doherty had had no occasion to claim it was, since his motion to reopen had been filed six months before the Meese decision issued.

The Attorney General found that the Extradition Act was not "previously unobtainable material evidence" or "reasonable justification permitting respondent to withdraw his waiver of his claim for asylum." He determined that implementation of the Extradition Act was "neither sudden nor unforeseeable." Eschewing reference to its Section 3, he further determined that it had no material effect on Mr. Doherty's position. App. 59a-71a, 74a.

Although the BIA had found that Mr.

Doherty's evidence of persecution was sufficiently compelling to warrant reopening, Attorney General Thornburgh denied the ultimate relief sought, without affording the respondent the hearing ordered by the BIA. Pet. App. 81a-91a. The Attorney General did not balance the nature and degree of persecution awaiting Mr. Doherty in the United Kingdom against any of the considerations recited to justify the Attorney General's negative exercise of discretion. The Attorney General did not dispute that Mr. Doherty's submissions on the issue of persecution established prima facie entitlement to the relief sought. Pet. App. 64a n. 21; see also Pet. App. 12a. Rather, he asserted it was "unnecessary" to address that issue, because Mr. Doherty had--or probably had--committed serious nonpolitical crimes and engaged in the persecution of others and was there-

fore ineligible for the relief sought. App. 83a-88a.

The Decision at Issue: The Second Circuit Rules That Attorney General Thornburgh Abused His Discretion.

The Second Circuit, 2-1, "conclude[d] that in the singular circumstances of this case [Attorney General Thornburgh] abused his discretion in denying Doherty's motion to reopen." Pet. App. 12a. It unanimously affirmed the Meese order, holding that under 8 U.S.C. 1253(a), Congress had "left the Attorney General broad discretion to determine what constitutes prejudice to national interests," and that such finding is "'essentially unreviewable[.]'" Pet. App. 8a.

Writing for the majority, Judge Pratt stressed that Attorney General Thornburgh's determinations as to the ultimate availability of the relief sought could not properly be made on the existing re-

cord.[13] As to the withholding of deportation claim, the need for an evidentiary hearing was "obvious" as Mr. Doherty's ultimate success or failure turns on the

---

[13]Judge Lumbard, dissenting, agreed that "[t]he real issue is the adequacy of the record" and that the case was "extraordinary" and "unusual." Pet. App. 45a, 34a-35a. He noted that "political judgments are at the heart of the decision not to reopen this case." Pet. App. 33a.

Judge Lumbard concluded no hearing was warranted because in seeking to be deported to a country where he would not be persecuted, Mr. Doherty was "manipulat-[ing] the process" and engaging in a "procedural ploy," and was therefore undeserving of asylum. Pet. App. 38a-39a.

The Attorney General's decision was also found by Judge Lumbard correctly to have denied withholding of deportation. The record provided adequate basis for concluding that the respondent had engaged in serious nonpolitical crimes and participated in persecution on account of political opinion. Pet. App. 43a-44a.

Judge Lumbard dismissed the decision of Judge Sprizzo as of "no precedential value," noting that the Second Circuit had not reviewed it on the merits. Pet. App. 44a. He took no note that the Second Circuit had concluded that "Judge Sprizzo engaged in a careful analysis of the political offense exception." United States v. Doherty, 786 F.2d at 493-494.

resolution of "formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record." Pet. App. 16a-17a. The correct resolution of the asylum claim is also dependent on "facts ... more properly determined at a hearing[.]" Pet. App. 26a-27a.

The Second Circuit found that Attorney General Thornburgh "seriously exceeded his discretion" when he denied Mr. Doherty asylum on the ground that deporting him to the United Kingdom, his fear of persecution notwithstanding, would serve United States policy interests. Pet. App. 26a. Attorney General Thornburgh's decision was premised "on the types of geopolitical concerns that congress intended to eliminate from asylum cases" (Pet. App. 25a), and thus was not based on "the 'legitimate concerns' of the relevant statutory provision," the Refugee Act of 1980, Pub. L.

No. 96-212, 94 Stat. 102. Pet. App. 18a.

The Second Circuit rejected Attorney General Thornburgh's "foreseeability" standard, finding it had no foundation in law and "would lead to absurd consequences" if applied. It concurred with the BIA that if an applicant were obliged to foresee all eventualities and guard against them, the process of litigating asylum applications would become unmanageable. Pet. App. 12a-13a.

The Second Circuit also rejected Attorney General Thornburgh's determination that Mr. Doherty had "waived" his right to seek asylum and withholding of deportation. Any notion that the deportee "assumes the risk" of adverse consequences from subsequent changes in circumstances is "incompatible with any motion to reopen[.]" Pet. App. 27a. In conclusion, the court rejected "the government's pro-

fessed concern for the 'integrity of the administrative process' [as] unconvincing in light of its own actions in this case." Pet. App. 28a.

Summary of the Argument

The Attorney General cannot deport Mr. Doherty to the country denied his extradition without a hearing on the likelihood of him being persecuted there. The Attorney General expressly stated that he denied Mr. Doherty's asylum application to insure that he serves in the United Kingdom a prison sentence imposed under that country's laws. The sentence was imposed for acts found to be political offenses by an American judge.

The option of refiling the extradition request has at all times been available to the British government. The political offense exception provision, which previously had barred Mr. Doherty's extra-

dition, has since been eviscerated by a supplementary treaty.

Under this unusual combination of circumstances, the effort to accomplish de facto the extradition denied de jure is an impermissible circumvention by the Attorney General of the laws governing extradition and an irregular use by him of the laws governing immigration. It is a further abuse of his discretion to deny Mr. Doherty's applications for asylum and withholding of deportation without affording him an evidentiary hearing, since Mr. Doherty would be entitled, as a matter of right under the renegotiated extradition treaty, to an evidentiary hearing that would be essentially coterminous.

The Attorney General cannot deny Mr. Doherty the relief of withholding of deportation in the absence of a hearing. The BIA and the Second Circuit determined

that he was entitled to one given the strength of the documentation supporting his motion to reopen.

Withholding of deportation is mandatory upon a showing that the individual's life or freedom would be threatened in a particular country. Because it must be granted if the requisite showing is made, the Attorney General cannot deny withholding of deportation without a hearing where the applicant has demonstrated prima facie eligibility. The BIA determined, by grant of Mr. Doherty's motion to reopen, that he had made the requisite showing. The Second Circuit was quite correct in determining that under these circumstances, the Attorney General abused his discretion when he deprived Mr. Doherty of the hearing ordered by the BIA.

The Attorney General engaged in a further abuse of discretion when he simul-

taneously deprived Mr. Doherty of the ordered hearing and denied him the ultimate relief of withholding of deportation on the grounds that he had committed serious nonpolitical crimes and that he had participated in the persecution of people described by the Attorney General as political opponents of the IRA. The Attorney General's findings of fact and conclusions of law on the political crimes issue were directly at odds with the decision that had held that Mr. Doherty had committed "classic" political offenses. The judge rendered that decision on the basis of a voluminous record, which the Attorney General had not examined, and after having observed Mr. Doherty on direct and cross examination, which the Attorney General had not done.

The determinations that Mr. Doherty had committed serious nonpolitical crimes

and engaged in the persecution of others were contrary to the controlling case law, without any support in the evidence of record, and, further, were premised on adjudicative facts said to be in the record of another--unrelated--proceeding. As to that proceeding, there was non-identity of parties and non-identity of issues. As to either ground of exclusion, the controlling regulations require that the applicant be afforded the opportunity to establish that the exclusion does not apply. The Attorney General further abused his discretion by denying Mr. Doherty this opportunity.

The Attorney General cannot deny asylum to an applicant on the ground that such denial serves the policy interests of this country. The claim that he can is a broadside attack on the Refugee Act of 1980. The Refugee Act was passed to con-

trol the Attorney General's discretion in asylum matters, not to enhance it, and to protect, not policies, but people from harm. The humanitarian and protective purpose of the asylum provision will be rendered illusory if it is interpreted to countenance the return of refugees to persecution because that is politically expedient.

The petitioner's argument ignores entirely the humanitarian and protective nature of the asylum provision of the Refugee Act, as well as the fact that its protections are available to those who have committed political crimes. The United Nations Convention Relating to the Status of Refugees excludes from protection those who have committed serious nonpolitical crimes, not serious political crimes. To the extent exclusion clauses like the serious nonpolitical crimes pro-

vision are applied, they must be applied restrictively. An expansive approach to the scope of protection available under the Refugee Act is demanded by our accession to the United Nations Protocol Relating to the Status of Refugees. The Refugee Act was enacted for the express purpose of conforming our law to the Convention and Protocol.

Other sections of the immigration law that confer broad grants of discretion on the Attorney General do not establish that he permissibly exercises similarly broad discretion under Section 208(a), 8 U.S.C. 1158(a). The Refugee Act, of which that section was part, was enacted specifically to provide protection solely on the basis of the needs of the individual for such protection.

No case has ever held that asylum may be denied on the basis of policy consider-

be denied on the basis of policy considerations, and the executive branch has in fact recently settled a major lawsuit on the basis of a stipulation that concedes that policy considerations are irrelevant in determining an applicant's eligibility for asylum. If the ultimate determination as to the grant of asylum can be based on policy considerations proscribed in determining simple eligibility, then refugees can be, and will be, reduced to objects of international barter.

ARGUMENT

I. ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION AND ACTED WITHOUT AUTHORITY WHEN HE DENIED ASYLUM IN ORDER TO INSURE THAT MR. DOHERTY SERVED HIS SENTENCE IN A BRITISH PRISON.

The British government wishes to inflict punishment on Joseph Doherty for acts it deems to be common crimes. Judge Sprizzo concluded that these acts were political offenses in their "most classic

form" and Mr. Doherty's extradition was therefore barred. Matter of Doherty, 599 F.Supp. at 276.

The decision was the fourth time in six years that an American court had denied on political offense grounds the request of the British government for a member of the IRA.[14] The protection afforded to dissidents by the exception has not successfully been claimed by other than three Irish republicans--McMullen, Mackin, and the respondent--for now more

---

[14]See also Quinn v. Robinson, No. C-82-6688 RPA (N.D. Cal. Oct. 3, 1983); In re Mackin, 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981); In re McMullen, Magistrate No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

Quinn successfully challenged an order certifying his extradition. The Ninth Circuit reversed the decision granting his petition for a writ of habeas corpus, and he was promptly extradited to the United Kingdom. See Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), cert. denied, 479 U.S. 882 (1986).

than three decades.[15]

The Departments of Justice and State disliked the McMullen, Mackin, and Doherty decisions. Departmental officials determined that the U.S.-U.K. extradition treaty must be changed to preclude judicial determinations adverse to the British government when it seeks extradition of a partisan in the struggle for Irish independence. See, e.g., Hearing on the Impact of the Supplementary Treaty Upon American Domestic Law and Upon the Ameri-

---

[15]Over the past three decades, the political offense exception has been invoked in only 24 cases. In the past two decades, only three of the British government's 64 extradition requests have been denied on the political offense ground. See generally "Abrogating the Relative Political Offense Exception to Extradition: The United States-United Kingdom Extradition Treaty," 20 J. Marshall L. Rev. 453 (1987); Bassiouni, "The Political Offense Exception Revisited: Extradition Between the U.S. and the U.K. - A Choice Between Friendly Cooperation Between Allies and Sound Law and Policy," 15 Den. J. Int'l L. & Pol'y 255 (1987).

can Constitutional Process in the Fight Against Terrorism Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 55-77 (1985).

The treaty was renegotiated. Supplementary Extradition Treaty With the United Kingdom, S. Tr. Doc. No. 99-8, 99th Cong., 1st Sess. (1985); S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. (1986). A new supplementary treaty foreclosed magistrates and judges sitting in extradition from finding any of the offenses enumerated therein as political. After 13 months of bitterly contentious hearings, the supplementary treaty was approved, although in a form different from that pressed upon the Senate by the executive branch. 132 Cong. Rec. 16,558 (1986) (Senate Resolution of Ratification). The political offense exception to extradition as between the

United States and the United Kingdom essentially ceased to exist, however.

Nothing in the law, either prior to or after the enactment of the supplementary treaty, precluded the British government from refiling its request for the extradition of the respondent. It has never done so.

The Department of Justice has sought to insure that, Judge Sprizzo's decision notwithstanding, Joseph Doherty is handed over to the British government, in order that he serve in the United Kingdom the sentence there imposed on him for the offenses found by Judge Sprizzo to be political, not criminal. The petitioner has expressly admitted that the deportation proceeding has been merely "an alternate means" to accomplish "the objective

... to get Doherty to the United Kingdom."[16] See p. 3 supra. Attorney General Meese specifically stated that he must be deported only to the United Kingdom because "it is ... in the interests of the United States that respondent serve his sentence in the United Kingdom." Pet. App. 126a. The punishment rationale was in turn subscribed to by Attorney General Thornburgh, who expressly predicated his discretionary denial of asylum on it. Pet. App. 82a.

Whether or not the Attorney General can deport an individual to a country denied his extradition, he cannot here deny Mr. Doherty asylum in order to accomplish that end. A foreign country's dis-

---

[16]In pursuit of this objective, Mr. Doherty thus became the sole deportee to have his designation of country disallowed as prejudicial. Pet. App. 155a. Designation is a substantive right. Landon v. Plasencia, 459 U.S. 21, 26 (1982).

gruntlement with an American judge's decision denying extradition is simply not a valid ground for a negative exercise of discretion.

The laws governing deportation and asylum were not enacted to accomplish the return of fugitives--be they political offenders or common criminals--to governments seeking to try or to punish them. The laws governing extradition were. See 18 U.S.C. 3181 et seq. Under those laws, the Attorney General is utterly without authority to determine whether a fugitive is to be returned to a requesting foreign government in order that he or she may be tried or punished for crimes. That mission is expressly limited to extradition magistrates and, in the event extradition is certified--which here it was not--to the Secretary of State. See 18 U.S.C. 3184, 3186.

The distinction between the processes of deportation and extradition is clear. "[E]ach has the effect of removing a person from the country," but they "are different things, and have different purposes." Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893). Extradition is the surrender of a criminal accused for the purpose of trial, or, if already convicted, punishment. In marked contrast,

> "[d]eportation" is the removal of an alien out of the country, ... without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

Id. Deportation involves no other sovereign and implicates no consideration beyond the alien's expulsion from this country.[17] McMullen v. INS, 788 F.2d 591, 596

---

[17]There is here another sovereign involved. The British government experienced "great disappointment" at the denial

(9th Cir. 1986).

The petitioner itself told the Second Circuit that

> [d]eportation and extradition are two entirely different processes having separate statutory bases. Deportation seeks the expulsion of aliens from the United States .... Extradition seeks the transfer of a fugitive for criminal prosecution in a specific foreign state with which the United States has a treaty ....
>
> The deportation statute, on its face, makes no mention of extradition .... [U]nlike the subject of an extradition proceeding, a deportee ... has the right to choose initially the country to which he will be deported. By preserving this statutory right for Nazi persecutors, Congress made it clear that despite their heinous crimes, such persons were to be treated as deportees, not extraditees.[18] (emphasis in original) (citations omitted).

---

of its extradition request and "has repeatedly and vigorously expressed its desire that the United States effect Doherty's deportation to the United Kingdom[.]" Pet. App. 126a.

[18]This has not been the treatment the Attorneys General afforded Mr. Doherty. He was not "given the same opportunity given to any deportee to designate a country to which he wished to be sent." Linnas v. INS, 790 F.2d 1024, 1031 (2d Cir. 1986), cert. denied, 479 U.S. 995 (1986). The overriding of Mr. Doherty's designated country, combined with Attorney General Thornburgh's discretionary denial of asylum for the reasons he stated, operate to "transform the deportation ... into an extradition." Id.

Brief of Respondent INS, No. 85-4163, at 45-46, Linnas v. INS, 790 F.2d 1024.

The extradition statute is wrongfully circumvented and the immigration laws abused when the latter are employed to return a fugitive to a country denied his extradition in order that he serve his sentence in that country. The immigration laws of this country were not enacted to facilitate the punishment of one convicted of an offense against another country's laws. Fong Yue Ting v. United States, 149 U.S. at 709. Nonetheless, that is the purpose for which they are here being

used. If, however, Mr. Doherty is to be removed from this country for the purpose stated--to serve in the United Kingdom the sentence imposed on him in the United Kingdom--then he must be removed by way of extradition, not by deportation pursuant to a denial of asylum.

This use of the immigration statutes to accomplish the function reserved to the extradition statute is made more irregular given the facts of the case. In the extradition proceeding, the offenses were determined to be political offenses, and the respondent's return, whether for purposes of trial or the serving of sentence, was flatly barred. Immigration law is not a legitimate way around that result.

Historically, no precept of law has been more universally accepted than the principle of refuge for political offenders. In this country, it has been incor-

porated into extradition law and immigration law both. The political offense exception affords protection to political offenders against extradition. Immigration law protects those who commit political crimes against return to any country where his or her life would be threatened. See, e.g., Banoff & Pyle, 16 N.Y.U. J. of Int'l L. & Politics 169.

Newly-emerged democratic states, sensitive to their own histories, embraced the principle of nonsurrender of political offenders. Companion to it was the principle of refuge or asylum. The notion that an individual may have engaged in acts of political violence did not, during the 19th century when the political offense exception became firmly fixed, in any way make him or her an unworthy candidate for the protection afforded by nonsurrender and asylum. Precisely because

their offenses were political, rebels were thought to be especially in need of protection; as to them the danger of persecution was so great that "the granting of asylum ... [came] generally to be regarded as a duty." Garcia-Mora, "The Present Status of Political Offenses in the Law of Extradition and Asylum," 14 U. Pitt. L. Rev. 371, 373-374 (1953). The political character of Mr. Doherty's offenses but exacerbates the impropriety of denying him asylum in order to insure that the British government can punish him for those very offenses.

Without affording Mr. Doherty the protection of the hearing ordered by the BIA, Attorney General Thornburgh denied his requests for asylum and withholding of deportation on the merits. Were a new request for Mr. Doherty's extradition made, he would be absolutely entitled to a hear-

ing on the issue of persecution. Under Article 3(a) of the supplementary treaty, the hearing would be for the purpose of determining whether, if surrendered, Mr. Doherty would be "punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." See S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. 16 (1986).

Clearly, both the British government and the Attorney General fear the prospect of a hearing on the issue of whether Mr. Doherty would be persecuted for proscribed reasons in the United Kingdom. Were it not so, the British government would have requested Mr. Doherty's extradition under the amended treaty, just as it requested Peter McMullen's. See In re the Requested Extradition of Peter Gabriel John McMullen, 86 Cr. Misc. #1 (S.D.N.Y. filed Dec. 1986); "Abrogating the Relative Political

Offense Exception to Extradition," 20 J. Marshall L. Rev. at 462 n. 58. Since it has not done so, the executive branch obviously views it as imperative to withhold its immigration counterpart. Were such hearing to be afforded Mr. Doherty in the immigration context, it would intrude upon the ability of the executive branch to execute the de facto extradition it struggles to realize through impermissible manipulation of the immigration laws. To that end it goes to frightening lengths to deprive the respondent of even a hearing.

II. THE SECOND CIRCUIT WAS CORRECT THAT ATTORNEY GENERAL THORNBURGH ABUSED HIS DISCRETION BY DENYING MR. DOHERTY THE ULTIMATE RELIEF OF WITHHOLDING OF DEPORTATION AND ASYLUM WITHOUT AN EVIDENTIARY HEARING, DESPITE THE BIA HAVING FOUND THAT ONE WAS WARRANTED.

A. Mr. Doherty is entitled to a hearing on his claim for withholding of deportation in order that the formidable issues of fact which control its disposition may be addressed on the basis of a fully-developed record consisting of evidence submitted by the parties to this case.

Without affording Mr. Doherty the hearing to which he has been found to be entitled, neither the Attorney General nor any other finder of fact can determine that he is not entitled to withholding of deportation, either because he has not established that his life or freedom would be threatened in the United Kingdom or because he falls under the two exclusion provisions relied on by the Attorney General, sections 243(h)(2)(A) and (h)(2)(C), 8 U.S.C. 1253(h)(2)(A) and (h)(2)(C). The nature of the relief mandated by Section 243(h)(1), 8 U.S.C. 1253(h)(1), dictates that Mr. Doherty must be afforded a hearing on his application. The Attorney General may not deprive him of it simply because a motion to reopen is implicated.

Motions to reopen are rarely granted by the BIA. In discussing its policy as to reopening, a former BIA chairperson

stated that "the Board will not reopen a case except for real and substantial reasons." 1 Gordon & Mailman, Immigration Law and Procedure Section 3.05[7][d] at 3-73 (rev. ed. 1991).

The BIA was satisfied that Mr. Doherty had presented real and substantial reasons; the Second Circuit endorsed the BIA's conclusion. It recognized that the mandatory nature of the withholding remedy dictated a hearing upon a showing of prima facie eligibility.[19] Pet. App. 16a.

Withholding of deportation is statutorily mandated by Section 243(h)(1), 8 U.S.C. 1253(h)(1), when an individual is

---

[19]The petitioner hints that Mr. Doherty did not establish prima facie eligibility for withholding of deportation. Petitioner's Brief at 35 n. 20. The BIA's order would not have permitted him leave to reopen to pursue that relief had he not. The order, however, speaks clearly in terms of both asylum and withholding. Pet. App. 100a.

able to establish that if "deported" or "returned" to a particular country, his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." If the individual demonstrates a clear probability of persecution, i.e., that it is "more likely than not" that she or he would be subject to persecution in the country of return, withholding of deportation must be granted. INS v. Stevic, 467 U.S. 407 (1984).

Section 243(h)(1) is the legislative embodiment of Article 33.1, the nonrefoulement provision, of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951). INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). The United States acceded to the United Nations Protocol Relating to the Status of Refugees in 1968, thereby bind-

ing itself to comply with Articles 2 through 34 of the Convention. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. Id.

Article 33.1 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on any of the proscribed grounds. 189 U.N.T.S. 150, reprinted in Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") 70 (1979). In enacting the Refugee Act of 1980, of which Article 33.1 is an integral part by virtue of it Section 243(h)(1), Congress acted specifically to bring domestic law into conformity with the Convention and Protocol. The

provisions of the Refugee Act, as codified in the Immigration and Nationality Act of 1952, must be interpreted and applied in a manner consistent with the Convention. INS v. Cardoza-Fonseca, 480 U.S. at 436-437.

Attorney General Thornburgh's decision to deny Mr. Doherty the relief of withholding of deportation, without a hearing at which his entitlement to that relief could be addressed, flows from the Attorney General's fundamental misapplication of Section 243(h)(1) and from a fundamental abuse of his discretion relative to motions to reopen.

INS v. Abudu, 485 U.S. 94 (1988), identified three grounds on which a decisionmaker can deny a motion to reopen, thus depriving the movant of a hearing. Under Abudu, a motion to reopen cannot be denied on the ground that the movant would not be entitled to the ultimate relief

sought when the relief that is sought is nondiscretionary:

> [I]n cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead ... over the two threshold concerns ... and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. Id. at 105 (emphasis added).

Abudu thus permits the decisionmaker to deny relief in the context of a motion to reopen only when the relief is discretionary. Here it is not. Relying on Abudu, the Second Circuit rejected Attorney General Thornburgh's claim that he could decline to reopen even when the movant had established a prima facie case for withholding of deportation. Pet. App. 16a.

The INS strains to find an interpretation of Abudu that would legitimize the Attorney General's having done what the

case so plainly says he may not. It therefore argues that "the undisputed facts in the existing record rendered respondent ineligible for withholding" and therefore it is "closely analogous" to the situation in Abudu where reopening can be denied when the movant fails to establish prima facie eligibility for the relief sought. Petitioner's Brief at 36, 37. The petitioner's argument founders on the existing record.

The Attorney General's determinations of fact and law were wholly at odds with those rendered by the judge who presided over the only evidentiary hearing Mr. Doherty has ever had. Unlike the Attorney General, Judge Sprizzo had observed Mr. Doherty testify. The judge also had had before him significant quantities of other

testimonial and documentary evidence.[20]

Evidence as to Mr. Doherty's period of service with the IRA and as to the IRA itself were before Judge Sprizzo, and his decision so reflects. After having observed Mr. Doherty throughout direct and cross examination and having considered the extensive proofs put forward, both by him and by the British government, Judge Sprizzo issued a decision declaring his offenses to be quintessentially political. That decision narrowly defined offenses which properly could be considered political and rejected the traditional two-pronged analysis as an insufficiently rigorous measure for offenses associated

---

[20]Mr. Doherty and other witnesses, including the British government's, testified at length. See Matter of Doherty, 599 F.Supp. 270; J.A. 109-190; C.A. App. 712-943. The hearing record and just some of the exhibits ran to seven volumes. United States v. Doherty, 786 F.2d at 494.

with "the kind of paramilitary terrorism that has become the plague of the modern age." Matter of Doherty, 599 F.Supp. at 274 and 275 n. 4.

Attorney General Thornburgh pronounced the correct analytical framework to be the two-pronged test articulated in McMullen v. INS, 788 F.2d 591 (9th Cir. 1986). The Attorney General accepted that a crime is political where there is a close and direct causal link between the crime committed and its alleged political purpose and object and it is not disproportionate to the objective or of an atrocious or barbarous character. Pet. App. 84a. On the basis of purported application of this test, the Attorney General arrived at his conclusion that Mr. Doherty had committed serious nonpolitical crimes and was therefore ineligible for withholding of deportation. See 8 U.S.C. 1253(h)(2)(C).

By contrast, in determining that Mr. Doherty's conduct constituted political crimes, and in their most classic form, Judge Sprizzo employed a mode of analysis in actuality more searching than Attorney General Thornburgh's. Judge Sprizzo measured Mr. Doherty's conduct as against a dozen criteria. They were substantially more rigorous than the two the Attorney General used, and Judge Sprizzo's analysis, in any event, encompassed both of the criteria the Attorney General deemed significant.

The judge considered: (1) whether the nature of the act was violative of any international law or (2) inconsistent with international standards of civilized conduct; (3) the context in which the act was committed; (4) the status of the party who committed the act; (5) the nature of the organization on whose behalf the act was

committed, including its structure and its mode of internal discipline; (6) the particularized circumstances of the place where the act took place; (7) whether the act was such as to cause indiscriminate death or injury or damage or (8) was directed either against civilians or civilian representatives of the government or (9) was committed in a place other than the territory where political change was to be effected; (10) whether any facts established that hostages were killed or injured; (11) whether the principles embodied in the Geneva Convention were violated; and (12) whether there was any evidence that the act was committed for personal reasons. He concluded, inter alia, that Mr. Doherty's offenses were neither violative of international law nor inconsistent with international standards of civilized conduct. Matter of Doherty, 599

F.Supp. at 274-277.

Given the posture of this case, Judge Sprizzo's decision that Mr. Doherty's offenses were indisputably political cannot be other than dispositive of the political crime issue in the immigration proceeding. It is the only decision rendered on the basis of a fully-developed factual record, pursuant to an evidentiary hearing. Absent the hearing ordered by the BIA, it must here control.

The petitioner offers no adequate reasons why it should not. Its assertion that the decision is erroneous (Petitioner's Reply Brief at 7) is utterly unsupported by reference to any case suggesting that the decision is in any way flawed. McMullen v. INS, 788 F.2d 591, the case on which petitioner rests its political crimes argument, itself acknowledges extradition law's political offense concept

to be the "nearest analogy" to the political crime concept in immigration law. Id. at 595; see also Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony," 1 Geo. Imm. L. J. 457 (1986) (decision whether to grant asylum in the U.S. to an alien who has been convicted of a crime is the counterpart of political offense exception to extradition).

If not dispositive, the decision of Judge Sprizzo, as the reasoned conclusions of a judge passing on an essentially identical issue, provides serious reasons for considering that Mr. Doherty has not committed a serious nonpolitical crime. Yet, in the face of this diametrically-opposed decision, the Attorney General peremptorily resolved the serious nonpolitical crimes issue against Mr. Doherty.

The Second Circuit was correct that

he abused his discretion in doing so: in these circumstances, the need for a hearing was "obvious," as was the need for a fully-developed record. Pet. App. 16a-17a. Instead, the Attorney General pretermitted the hearing, thus prematurely and improperly discrediting key elements of Mr. Doherty's claim and simultaneously depriving him of any opportunity to establish that the exclusion grounds relied on by the Attorney General do not apply. Sakhavat v. INS, 796 F.2d 1201, 1204-1205 (9th Cir. 1986); 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.16(3)) (1990) (if evidence indicates there are serious reasons for considering that the applicant committed serious nonpolitical crimes, "the applicant shall have the burden of proving by a preponderance of the evidence that such ground[] do[es] not apply."). The Attorney General thoroughly abused his

discretion in doing so, for, as the Second Circuit recognized, "[e]xamination of a fully-developed record is a necessary precursor to the fair resolution of Doherty's claim[.]" Pet. App. 17a.

Implicitly acknowledging that the evidence of record does not in fact provide basis for his determination that Mr. Doherty committed serious nonpolitical crimes, Attorney General Thornburgh declared him statutorily ineligible because "there is substantial evidence that PIRA has committed terrorist activities directed at innocent civilian populations" and "[t]hese 'random acts of violence' against civilians constitute serious nonpolitical crimes.'" Pet. App. 95a.

In Patterns of Global Terrorism: 1988, the State Department report cited by the Attorney General (Pet. App. 84a) and by petitioner, terrorism, as per "the

definition commonly used by the US government for the past 20 years," is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets[.]" U.S. Dep't of State, Patterns of Global Terrorism: 1988 v (1989). The definition of terrorism in the document petitioner views as authoritative,[21] when applied to this record, does not yield "substantial evidence that the [IRA] has committed terrorist activities directed at innocent civilian populations," notwithstanding the Attorney General's assertion to the contrary. Pet. App. 65a. The record in this case establishes that it is the policy of the IRA not to engage in acts of violence directed against civilian populations, that the principal targets of its military operations are the crown forces and the paramilitary police, and that attacks on economic targets are preceded by warnings in order that civilian casualties are avoided. See J.A. 114-116, 138-140, 142-143, 168-169.

[21]According to the petitioner, the report establishes that the United States "officially classifies" the IRA as a terrorist organization. Petitioner's Brief at 41. The report also "officially classifies" the African National Congress (ANC) the same way. U.S. Dep't of State, Patterns of Global Terrorism: 1988 82. Nelson Mandela, the leader of the "terrorist" ANC, was received by President Bush at the White House and addressed a joint session of Congress after his release from prison in 1990. N.Y. Times, June 26, 1990, at A1, col. 1; N.Y. Times, June 27, 1990, at A11, cols. 1-6.

The Attorney General pointedly disregarded this evidence of record, and the import of Judge Sprizzo's determination, in favor of the decision--and the record--in an unrelated case to which the respondent was not a party. The Attorney General stated that "the '[IRA's] random acts of violence ... are 'exhaustively documented in the record' of the McMullen

case." Pet. App. 85a n. 46 (at p. 86a).

The Attorney General cannot base a determination about Mr. Doherty's eligibility on "facts" that are not about his conduct,[22] that are not evidence of record, and that are based on "evidence" alleged to be of record in an unrelated proceeding to which the respondent was not a party. Attorney General Thornburgh was obliged to base his decision as to Mr. Doherty's fate on the record in Mr. Doherty's case. The statute imposes this elemental requirement. Section 242(b), 8

---

[22]Testimony about every aspect of Mr. Doherty's conduct--including every aspect of it the petitioner claims probative of the serious nonpolitical crimes issue--was heard by Judge Sprizzo. Had Mr. Doherty's conduct been infected by any elements of nonpolitical crime, the restrictive manner in which Judge Sprizzo defined political offenses would have precluded a ruling in the respondent's favor. See J.A. 114-123, 138-140, 142-143, 146-149, 153, 156-158, 163-189; C.A. App. 736, 748, 759-760, 843-844, 928-929.

U.S.C. 1252(b) (Supp.). The Attorney General disregarded it.

His finding of statutory ineligibility was not grounded on the adjudicative facts in this record. "Adjudicative facts are the facts about the parties and their activities[,]" and they " ... answer the questions of who did what, when, where, how, why, with what motive or intent[.]" Zamora v. INS, 534 F.2d 1055, 1062 n. 4 (2d Cir. 1976); 2 Davis, Administrative Law Treatise Section 12.3, at 413 (2d ed. 1984).

The Attorney General admittedly based his decision about Mr. Doherty on adjudicative facts said to be in the McMullen record. McMullen is an unrelated proceeding involving different parties and different issues. Such "proof" as McMullen may have offered was offered to establish that the IRA sought to punish him as a

traitor.[23] It cannot be used to establish that Mr. Doherty is ineligible for withholding of deportation. The determination as to Mr. Doherty's entitlement to the relief sought must be made on the basis of evidence of record in this case, not in McMullen. See Matter of Dass, Int. Dec. #3122 (BIA 1989) (applications "must be evaluated based on matters of record, i.e., ... the evidence introduced by the parties to the case under consideration").

---

[23]McMullen based his claim on the allegations that he was in danger of persecution from the IRA and from the police in Ireland. Matter of McMullen, 17 I. & N. Dec. 542, 543 (BIA 1980). The evidence he put forward as to the nature of the IRA necessarily portrayed the organization as unfavorably as possible. Neither McMullen nor the INS had any incentive to depict the IRA other than unfavorably, nor did either have any incentive "fully and vigorously" to litigate the issues central to this litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-333 (1979). Under these circumstances, the Second Circuit was correct that the need for individualized factfinding in the context of Mr. Doherty's case was obvious. Pet. App. 16a.

Attorney General Thornburgh asserted he "need not determine that respondent had committed any of [the] unprotected crimes [.]" He felt it sufficient to state that the IRA had, and Mr. Doherty could thus be found ineligible. Pet. App. 85a. This misreads the statute.

An alien cannot be precluded from withholding of deportation except when there are serious reasons for considering that the alien committed serious, non-political crimes. 8 U.S.C. 1253(h)(2)(C). Relief as fundamental as withholding of deportation cannot, consistent with the Convention, be withheld on the basis of surmise about the applicant's conduct and activities. The petitioner's argument is contrary to the requirement that the exclusion clauses, of which 8 U.S.C. 1253(h)(2)(C) is one, must be restrictively interpreted and applied. Indeed, the Hand-

book of the Office of the United Nations High Commissioner for Refugees, acknowledged by this Court to provide "significant guidance" as to our obligations under the Protocol, contains the admonition that "due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner." UNHCR Handbook 42 para. 180 and see also 35 para. 149; INS v. Cardoza-Fonseca, 480 U.S. at 439 n. 22.

The Attorney General arrived at his decision denying withholding in a manner inconsistent with the international law mandate underlying the withholding provision. Before determining whether an applicant who has "resorted to force or committed acts of violence" might fall within the exclusion for serious nonpolitical crimes, the Handbook counsels the de-

cisionmaker first to determine whether the individual comes within the scope of the Convention's inclusion clauses. UNHCR Handbook 41-42 paras. 176-177. Only then is the decisionmaker positioned to make a properly informed decision as to whether the applicant is rendered ineligible by one or more exclusion clauses. In determining whether an offense is a serious nonpolitical crime, "all the relevant factors--including any mitigating circumstances--must be taken into account." If the offense is found to be nonpolitical, the nature of the offense still must be balanced against the degree of persecution feared by the individual seeking protection. Id. at 37 paras. 156-157. The commission of political crimes which involve violence or the use of force is not basis for being denied relief, except in

the case of acts of an atrocious nature.[24] The decisionmaker must carefully examine the nature of the act, the applicant's motives in committing the act, and the link between the act and its alleged political purpose. UNHCR Handbook 36 paras. 151-152, 41 para. 176.

Attorney General Thornburgh resolved the issues underlying the serious nonpolitical crimes determination without attention to these controlling considerations. His determination on the issue of serious nonpolitical crimes was thoroughly flawed from start to finish, a function of his tortuous effort to evade the decision of Judge Sprizzo and thus clear the way for Mr. Doherty's delivery to the British government. The Attorney General may not so

---

[24]Judge Sprizzo's careful analysis determined there were no such acts here. See pp. 62-63 supra.

blatantly disregard judicial decisions with which he disagrees. Here, the existence of an authoritative decision, which embraced conclusions in fundamental opposition to his, should, at the very least, have signaled the need for a hearing at which the points of divergence could have been fully developed in an adversarial context.[25]

The Attorney General also determined that Mr. Doherty is ineligible for withholding, pursuant to 8 U.S.C. 1253(h)(2)(A), because of "participation in the PIRA's persecution of political oppon-

---

[25]Given the existence of the Sprizzo decision, the Attorney General's decision to here pretermit any hearing was unjustifiable. Further, the most recently-enacted regulations make clear that an applicant is entitled to an evidentiary hearing on the issues implicated by the conduct upon which the denial--whether mandatory or discretionary--is based. See 55 Fed. Reg. 30,683, 30,684 (to be codified at 8 C.F.R. 208.13(c), 208.14(b), 208.16(c)(3) (1990).

ents." Pet. App. 89a. Understandably, the petitioner does not argue seriously the propriety of this branch of the Attorney General's decision. It suffers from the same flaws as the determination made pursuant to 8 U.S.C. 1253(h)(2)(C).

Evidence in the McMullen record arguably establishing that the IRA has engaged in acts of persecution is not evidence of record in this proceeding, nor is it probative of whether Mr. Doherty personally engaged in acts of persecution. The most recent cases to address conduct in which Mr. Doherty engaged, as established by record evidence, hold that it does not constitute persecution and indeed could not or all members of armed opposition groups would be barred from asylum and withholding. Domestic law does not contemplate that result. Matter of Rodriguez-Majano, Int. Dec. #3088 (BIA 1988)

(Congress did not intend to restrict asylum and withholding only to those who take no part in armed conflict); Matter of Fuentes-Sanchez, Int. Dec. #3065 (BIA 1988) (attacks by guerrillas on police and military are not acts of persecution).

B. The Attorney General cannot deny Mr. Doherty asylum and deport him to the country denied his extradition on the ground that doing so will serve policy interests of the United States.

The policy concerns and foreign relations considerations the petitioner claims this case to implicate are inextricably intertwined with the fact that Mr. Doherty was found to have committed political offenses, as opposed to common crimes. The fact that one has committed political offenses does not deny an asylum applicant the protection of that body of law. The Convention, Protocol, and Handbook, and the Refugee Act of 1980, unambiguously recognize that the political offender is

entitled to protection.[26]

Centuries ago political offenders were routinely handed over to the governments they resisted, because the requested government perceived it to be in their interests to do so. As civilization advanced, however, societies increasingly declined to return failed rebels on the basis of concern about the nature of the treatment offended governments would visit upon them. The concepts of political offense and political asylum came to be uni-

---

[26]Convention, 189 U.N.T.S. 150, art. 1(F)(b), reprinted in UNHCR Handbook 60; UNHCR Handbook 20 para. 86, 36 paras. 151-152, 37 paras. 156-157, 41 para. 176; 8 U.S.C. 1101(a)(42) and 1253(h)(2)(C). Even the most recently-implemented asylum regulations, which compel denial of asylum in specific instances, do not compel denial where individuals have committed political crimes, or even, for that matter, serious nonpolitical crimes. 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.14(b) (1990)). Previously, this had not been the case. See, e.g., 8 C.F.R. 208.8(f)(v) (1989).

versally and inextricably intertwined; they continue to be so to this day. See, e.g., Banoff & Pyle, 16 N.Y.U. J. of Int'l L. and Politics at 169, 178-182; Helton, 1 Geo. Imm. L. J. 457.

The law gradually extended protection to persons who, even if not political offenders, would be subject to persecution if returned to a particular country. The unwillingness to send people to venues where they are at serious risk of persecution has become a firmly-fixed principle of law; Goodwin-Gill makes the categorical assertion that "no state today claims any general right to return refugees or bona-fide asylum seekers to a territory in which they may face persecution.[.]" Goodwin-Gill, The Refugee in International Law 99 (1983).

To accomplish the proscribed extradition of one judicially determined to be a

political offender, the petitioner argues that the Attorney General can return an asylum applicant to a country in which he is likely to face persecution when doing so would serve this country's policy interests. This remarkable argument, a direct assault on the core purpose of the Refugee Act of 1980, invites return to a mode of international relations long ago and rightfully abandoned. It cannot be reconciled with the very fact of the passage of the Refugee Act.[27]

---

[27]In an effort to justify the extreme position it advances, the petitioner claims that the Second Circuit

> held that the Attorney General's discretion [under Section 208] may only be exercised to promote "administrative fairness and efficiency" and prevent procedural "abuses" in the asylum system.

Petitioner's Brief at 19. The Second Circuit held no such thing. It merely observed that the BIA's discretionary denials of asylum had been "primarily for

The Second Circuit held that the Attorney General exceeded his discretion when he denied Mr. Doherty's application for asylum on the basis of policy concerns relied on by Attorney General Meese in disallowing Ireland as the respondent's designated country of deportation. Pet. App. 26a. The court placed appropriate emphasis on the history and purpose of the legislation. Guided by this Court's decision in INS v. Rios-Pineda, 471 U.S. 444, 451-452 (1985), the Second Circuit recognized that the discretion available to be exercised by the Attorney General pursuant to Section 208(a), 8 U.S.C. 1158(a), is circumscribed by "the 'legitimate concerns' of the relevant statutory provision." Pet. App. 18a. The court examined the legislative history and found it sig-

---

reasons of administrative fairness and efficiency[.]" Pet. App. 24a.

nificant that Congress chose to define "refugee" in a politically neutral manner. Pet. App. 21a. The court also noted that by passing the Refugee Act, Congress was purposefully limiting the Attorney General's discretion. Id.

The petitioner predicates its argument on a negative: nothing in Section 208 says the Attorney General may not deny asylum to an eligible individual on the basis of "foreign policy concerns." Petitioner's Brief at 20. This superficial argument ignores several significant points. First, nothing in Section 208 says the Attorney General can consider foreign policy interests. Conversely, Section 207(e)(6) specifically identifies foreign policy interests as a factor to be considered when presidential representatives consult with members of Congress to establish annual plans regarding the over-

all ceilings and origins of refugees to be admitted from abroad. 8 U.S.C. 1157(e)(6). Second, the Refugee Act itself was legislative embodiment of the humanitarian principles contained in the Convention and Protocol and is therefore incapable of being construed in the manner suggested by the petitioner.

The concerns which animated the enactment of these refugee treaties were profoundly humanitarian. Were it otherwise, they would not have come into existence at all. Their purpose was to protect and assist refugees. The concept of asylum is an outgrowth of the same protection-oriented concerns the refugee treaties embody, and therefore asylum decisions are to be rendered in the same humanitarian fashion. UNHCR Handbook 3 para. 1, 7 para. 25.

Congress enacted the Refugee Act to

bring domestic law into conformity with the Convention and Protocol. INS v. Cardoza-Fonseca, 480 U.S. at 436. The statutory purpose of protecting refugees is abrogated utterly if the grant of discretion conferred upon the Attorney General can be read to encompass unconstrained authority to consign selected refugees to persecution in the interests of political expediency. The Attorney General's decision, expressly grounded in just such an interpretation of Section 208, fundamentally contravenes the purpose of the statute and is therefore an abuse of discretion. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) ("agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"); Manhattan General Equipment

Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936) (power to administer statute is confined to effecting will of Congress and conduct out of harmony with the statute is a nullity). Indeed, this Court cautioned that when scrutinizing administrative decisions, reviewing courts "must not 'rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' (citations omitted)." Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983).

Section 207 is neither "closely related" to Section 208, as the petitioner contends, nor does it in any way "confirm" that the Attorney General has discretion so broad that he can deny an individual applicant asylum on the basis of policy considerations. Petitioner's Brief at 20.

Section 207 deals with the decisionmaking process governing the admission of refugees from abroad. Given its scale and inherent selectivity, this exercise necessarily implicates foreign policy considerations in a way that adjudicating individual asylum applications under Section 208 does not and must not.

Prior to the Refugee Act of 1980, the Attorney General's discretion had been exercised in a manner accurately described as freewheeling, a situation with which Congress grew increasingly dissatisfied. See generally Anker & Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," 19 San Diego L. Rev. 9, 19, 30-64 (1981). With its enactment, the terrain was significantly altered. The parole power, which, as used by the Attorney General to bring in refugees from abroad, had functioned as an "unstated,

hidden, and ad hoc refugee admission policy," was rigorously circumscribed. Id. at 19; 1 Gordon & Mailman, Immigration Law and Procedure Section 2.04[7] at 2-25. Withholding of deportation, which had been discretionary, became mandatory. Asylum was for the first time given a statutory foundation[28] and was to be granted on the basis of individualized determinations divorced from geographic and political considerations. INS v. Cardoza-Fonseca, 480 U.S. at 427, 429, 435.

The Refugee Act required that uniform asylum procedures be formulated, and with the regularization of the asylum process and the constriction of the parole power, it carefully removed nonhumanitarian con-

---

[28]The predecessor to Section 208 was a regulation promulgated by the petitioner in 1975 permitting asylum to be granted in accordance with the Convention. 8 C.F.R. 108.2 (1975).

siderations from the decisionmaking process.[29] Thus, as integral parts of the Refugee Act of 1980, Sections 207 and 208 came into existence specifically to control the discretion of the Attorney General. The petitioner's argument is a bald effort to restore refugee law--and the Attorney General's discretion--to their pre-Refugee Act status. See generally Anker & Posner, 19 San Diego L. Rev. 9 (1981).

The petitioner infers from other sections of the act that the Attorney General's discretion under Section 208 is unfettered. Section 244, 8 U.S.C. 1254, is

---

[29]We would respectfully refer the Court to the Brief for Amicus Curiae Office of the United Nations High Commissioner for Refugees and to the Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives for discussion of the humanitarian and nonideological nature of refugee law.

deemed to be particularly instructive. It is not. As opposed to Section 208, which is remedial and protective in essence, Section 244 is restrictive. See, e.g., INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981) (per curiam) (choice by Congress of phrase "extreme hardship" indicative of exceptional nature of suspension remedy).

Section 243(a), 8 U.S.C. 1253(a), also relied on by the petitioner, serves a function quite different from Section 208 and is therefore not a useful referent when defining the scope of his discretion under Section 208.[30] It is most readily understood as a means of departure control and is akin to Part 215 of 8 C.F.R., which

---

[30]The Second Circuit recognized the Attorney General's discretion under Section 243(a) to be very broad. Pet. App. 8a-9a. The fact that it did not find his discretion under Section 208 to be as expansive does not establish that it took an impermissibly narrow view of his role in asylum cases.

permits INS officers to prevent any alien whose departure would be "prejudicial to the interests of the United States" from leaving the country until a hearing is held. 8 C.F.R. 215.1 et seq. (1990 ed.).

Measured against the legislative history, and against the other sections the petitioner claims to be relevant, the interpretation of Section 208 the petitioner advances fundamentally contradicts the principles that are the bedrock of the Convention and Protocol and thus of the Refugee Act itself. That body of law affords relief to those who are refugees because they are in need of protection. The Attorney General's effort to recast the law so as to be able here to accomplish the extradition to an ally of one who has been recognized as a political offender is an effort utterly at odds with the concept of providing protection to

those who are at risk.[31] Decisions as to

---

[31]The history of the political offense exception provision richly documents the fact that political offenders were thought to be at very great risk of political persecution if asylum countries acceded to requests for their return. To insure that decisions of such magnitude were untainted by considerations of political expedience, they have been pointedly withheld from the executive branch. Matter of Mackin, 668 F.2d 122, 133-134 (2d Cir. 1981). Even as between the United States and the United Kingdom, Congress's concern about the persecution of political offenders remains undiminished, a fact evidenced by the supplementary treaty's express abrogation of the rule of noninquiry. See S. Exec. Rep. No. 99-17, 99th Cong., 2d Sess. 16 (art. 3(a)) (1986). If policy-related concerns do not outstrip persecution-related concerns in extradition proceedings, which act upon international relations with more immediacy than immigration proceedings, there is no persuasive basis for petitioner's argument that in the immigration context, refugees can permissibly be returned to persecution for reasons of political expediency. Cf. Matter of Mackin, 668 F.2d at 133 (decisions on the political offense exception can cause difficulties in foreign relations; unless decisionmaking remains with judicial branch, the political offense exception would be eviscerated "with nations with which we are allied or whose favor we especially desire"); McMullen v. INS, 788 F.2d at 596 (all the United States seeks in deporting an individual whose extradi-

whom protection will be afforded are to be the product of individualized adjudications, untainted by bias or parochial considerations. See Convention, 189 U.N.T.S. 150, art. 3, reprinted in UNHCR Handbook at 60; UNHCR Handbook 12 para. 39, 48 paras. 201-202. If the Refugee Act is construed to permit some refugees to be singled out and denied asylum on the basis of the state's policy interests, then the statute's protective function, and the attendant emphasis on nonideological decisionmaking, becomes illusory, and protection is jeopardized for all other refugees.

The petitioner purports to find support for its position in decisions of this Court. Yet, the isolated sentences from

---

tion has been denied is to expel him from U.S., and in doing so, should take care not to "'interfere with any internal struggle' (citation omitted)").

Cardoza-Fonseca and Stevic on which it places such weight merely state the unexceptionable propositions that withholding of deportation is mandatory, asylum is not, and an individual who is eligible for asylum may be granted or denied it in the discretion of the Attorney General. INS v. Cardoza-Fonseca, 480 U.S. 421; INS v. Stevic, 467 U.S. 407. This Court has never, however, addressed the issue of the scope of the Attorney General's discretion in matters of asylum.

By citing dicta about the power of the executive branch in immigration matters or about an interconnection between immigration decisions and foreign policy (Petitioner's Brief at 26-27 and n. 12), the petitioner demonstrates there is no support in the case law for the aberrant position it advances. No court has, in the 11-year history of the Refugee Act,

held, or observed in dictum, or even intimated, that the Attorney General can permissibly deny asylum to an individual who has established a prima facie case of persecution and then return him to a country where he is in danger of persecution in order to advance this country's policy interests.

By its conduct, the executive branch has effectively repudiated its own argument. When lobbying for the excision of the political offense exception from the U.S.-U.K. treaty of extradition, Abraham Sofaer, legal advisor to the State Department, told Congress it need not hesitate to do away with the provision, because "even though the political offense exception will not be applicable, the asylum doctrine will be[.]" Hearing on the Impact of the Supplementary Treaty before the Subcomm. on the Constitution of the

Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 80. The "asylum doctrine" is not "applicable," however, if the Attorney General withholds asylum from those he chooses to sacrifice for reasons of state. Further, the Departments of Justice and State recently settled a major lawsuit that mounted "systemic challenges to the processing of asylum claims" on the basis of a stipulation that provides that "under the new asylum regulations as well as the old" "foreign policy ... considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." They stipulated that other irrelevant factors were whether the individual is from a country whose government the United States supports or with which it has favorable relations and whether the United States agrees with the political or ideological

beliefs of the asylum seeker. See American Baptist Churches v. Thornburgh, 760 F.Supp. 796 (N.D. Cal. 1991).

The American Baptist Churches ("ABC") stipulation illuminates the weakness of petitioner's "foreign policy concerns" argument. The language of the stipulation is itself tacit admission that the Second Circuit interpreted the Refugee Act correctly when it held that foreign policy and other geopolitical considerations are not relevant to the determination of asylum applications.

The circuit court's decision articulates the very interpretation of asylum law the executive branch has bound itself to respect. It matters not that the ABC stipulation speaks in terms of determining whether an individual is eligible for asylum, as opposed to whether he or she will be granted asylum. It is bizarre and

cynical to argue that, ABC notwithstanding, a refugee can be denied asylum on the basis of foreign policy considerations that could not permissibly be considered even in making the threshold determination of whether the individual is eligible for asylum.[32]

Section 208(a) was expressly enacted to accomplish a humanitarian result, and it cannot, consistent with that purpose, be construed to countenance discretionary denials of asylum in those instances where the Attorney General deems them to be in the interests of the state. To so interpret the Attorney General's discretion under Section 208 would lead to consequences starkly disconsonant with the protective purpose of the statute. INS v. Phinpath-

---

[32]Nonetheless, the petitioner does so argue. See Petitioner's Reply Brief at 3-4.

ya, 464 U.S. 183, 198 (1984) (Brennan, J., concurring) (when construing statute, general terms must be limited in their application so as not to lead to injustice, oppression, or absurd consequence); INS v. Errico, 385 U.S. 214, 225 (1966) (in construing immigration statute, especially one designed to accomplish a humanitarian result, must be mindful of humanitarian purpose and resolve doubt in favor of alien).

Finally, the most recent asylum regulations enacted specify a number of grounds on which asylum must be denied and a number of grounds on which it can be denied. Nothing in them, or in earlier regulations, suggests that foreign policy concerns are a factor properly considered when deciding whether to deny asylum in an

exercise of discretion.[33] The regulations make express that asylum is a protection-oriented process "distinct from the normal operation and administration of the immigration process" and that its grant must be guided by humanitarian considerations. 55 Fed. Reg. 30,674 (1990). Returning a human being to a country where he is likely to be persecuted because not to return him might disadvantage this country's relations with a foreign government is an act incapable of being described as "humanitarian."

III. THE BIA AND THE SECOND CIRCUIT WERE CORRECT THAT REOPENING WAS WARRANTED.

The denial of the petitioner's motion

---

[33] See, e.g., 8 C.F.R. 208.8(f) (1989); 55 Fed. Reg. 30,683 (to be codified at 8 C.F.R. 208.14(b), (c) (1990)). Even the earliest asylum regulations, enacted pursuant to United States accession to the Protocol, expressly acknowledged the protection function by linking asylum applications to the Convention. 8 C.F.R. 108.2 (1975).

to reopen cannot properly be evaluated apart from the history of the proceedings that have gone before. On every occasion, Mr. Doherty has prevailed before the Attorney General's delegatees. The petitioner had been unable to prevail until the Attorney General entered the case and reversed decisions in Mr. Doherty's favor. The Attorney General rarely ever renders a decision in an immigration case. Pet. App. 28a. In no case other than this one has he done so twice. Further, his decision broke with past practice in another significant particular in that he heavily immersed himself in resolving mixed questions of fact and law.[34]

Both the Second Circuit and the BIA

---

[34]There have been only eight published decisions by the Attorney General in the past two decades. They are referenced in the Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives.

agreed that the case fully justified reopening and that Mr. Doherty had met and satisfied all the requirements imposed by the regulations. Pet. App. 11a-28a, 93a-100a, 108a-115a. Both were sensitive as well to the fact that the case had a unique history. In the context of reopening, that fact bears special weight, as this Court has recognized. Although reopening is discretionary, that discretion is abused when reopening is denied despite submissions revealing the case to be "particularly unusual." See INS v. Jong Ha Wang, 450 U.S. at 144, 145.

The Attorney General's decision denying reopening impermissibly ignored that this is a "particularly unusual" case. The Attorney General knew it to be such. The BIA's earlier decisions had taken note of its remarkable history, and Attorney General Thornburgh was of course aware

that his predecessor had already rendered one decision in the case.

Nothing in the history of this case or in Mr. Doherty's motion to reopen justifies the Attorney General's punitive application of the reopening regulations. In defending it, the petitioner argues principally that the Extradition Act 1987 was not a material change in the law of Ireland, and even if it was, it was immaterial because Mr. Doherty's designation of Ireland had been disallowed.

To discount the factual and legal significance of the Extradition Act's implementation, the Attorney General refused to give proper weight--or indeed any weight--to the portions of the regulations which make reopening available "on the basis of circumstances which had arisen subsequent to the hearing." 8 C.F.R. 3.2 (1990); see also 8 C.F.R. 242.22 (circum-

stances have arisen after the hearing "on the basis of which the request is made"). The Extradition Act 1987 did not become effective until December 1, 1987, more than 14 months after the order of deportation was entered. Its implementation on that date is unarguably a circumstance that arose subsequent to the hearing.

The petitioner also urges that the Extradition Act 1987 was not a material change in Irish law because its "primary effect" was "to provide an express statutory basis for extradition" where political offenses were involved. Petitioner's Brief at 47. There had previously been no statutory basis for extradition in those circumstances, and further, the legislation which had previously controlled, the Extradition Act 1965, provided that "[e]xtradition shall not be granted for an offence which is a political offence or an

offence connected with a political offence." Clearly, the implementation of the Extradition Act 1987 did work a dramatic and material change in Irish law. Compare Extradition Act 1965, No. 17, sections 11(1) and 50(2) (1965) with Extradition Act 1987, section 3 (J.A. 97-99).

Alternatively, the petitioner argues that since Attorney General Meese's order foreclosed deportation to Ireland, any change in Irish law was irrelevant. The Extradition Act was powerfully relevant, however, on December 3, 1987, the day on which the motion to reopen was filed. The immigration judge's order of September 19, 1986, directed that Mr. Doherty be deported to Ireland. The Meese order directing deportation to the United Kingdom would not issue until a full six months later. Thus, on the date the motion to reopen was

filed, a change in Irish law that guaranteed subsequent extradition to the United Kingdom pursuant to Mr. Doherty's deportation to Ireland was not dismissable as irrelevant. The prospect of indirect but certain "return"[35] to the country where one will be persecuted is no less a ground for relief than deportation directly to a country where one will be persecuted. See Amanullah v. Cobb, 862 F.2d 362, 367 (1st Cir. 1988).

When the Meese order did issue, the prospect of persecution in the United Kingdom became even more immediate. The respondent's fear of persecution upon return to the United Kingdom had prompted

---

[35]Section 243(h)(1) does not speak simply in terms of proscribing deportation. Rather the Attorney General "shall not deport or return any alien ... to a country" where his/her life or freedom would be threatened. 8 U.S.C. 1253(h)(1) (emphasis added).

him immediately to file an application for asylum within days of being taken into custody in 1983. That same fear prompted him to file his motion to reopen within days of the implementation of the Extradition Act. At the time the motion was filed, the entering into effect of the Extradition Act was indisputably a legally sufficient basis for filing a motion to reopen in order to pursue relief that would bar his return--directly or indirectly--to the United Kingdom.

That an order subsequently issued requiring Mr. Doherty's deportation directly to the very country where he feared persecution meant only that the circumstance that had occasioned the filing of the motion--the implementation of the Extradition Act 1987--itself receded in significance. The issuance of the Meese order, however, which directed his deportation to

the United Kingdom and reversed the order directing his deportation to Ireland, made the need for the relief sought through the motion all the more acute. Mr. Doherty had filed the motion to protect against being returned indirectly to the country where he feared persecution; Attorney General Thornburgh denied the motion because Attorney General Meese's order insured Mr. Doherty's direct return to the country where he feared persecution.

The Attorney General's decision is an exercise in sophistry, not reasoned decisionmaking, and it is best understood as the consummation of the unprincipled and failed eight-year effort "to get Doherty to the United Kingdom." See p. 3 supra. The decision itself, the tortuous course of these proceedings, and the many other decisions in the respondent's favor demonstrate why Joseph Doherty must be afforded

the hearing the Attorney General would have him denied.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed and the case remanded for further proceedings consistent with the court's opinion.

Respectfully submitted,

SOMERSTEIN & PIKE
By: MARY BORESZ PIKE
Counsel of Record
401 Broadway, 27th Floor
New York, New York 10013
(212)925-3232

Of Counsel:
ARTHUR C. HELTON
Lawyers Committee for Human Rights
330 Seventh Avenue, 10th Floor North
New York, New York 10001

June 5, 1991